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In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

MAX JANIS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT H. BORK,
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MAX JANIS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America and Frank S. Schmidt, District Director of Internal Revenue for the District of Los Angeles, California, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The findings of fact, conclusions of law and order of the district court (App. A, *infra*) are not officially reported. The memorandum of affirmance of the court of appeals (App. B, *infra*) is not officially reported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*) was entered July 22, 1974. A petition for rehearing was denied on September 5, 1974 (App. D, *infra*). By

order dated November 27, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including February 2, 1975 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a federal civil tax assessment is invalid when the Internal Revenue Service's knowledge of the taxpayer's liability and its computation of the amount due are based upon evidence seized by local law enforcement officers pursuant to a defective search warrant.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

On November 26, 1968, the Los Angeles Police Department obtained a warrant directing a search for bookmaking paraphernalia on the persons of respondent and of Morris Levine, and at certain specified locations. The warrant was issued by a judge of the Municipal Court of the Los Angeles Judicial District and was based upon the affidavit of a police officer that he had received information from a confidential and reliable informant that respondent and Levine were engaged in taking bets on certain telephone numbers

(App. A, *infra*, p. 3A; Pltf. Exs. 1, 2; I-R. 111–117).[1]

In the ensuing search, conducted pursuant to the warrant by Los Angeles police officers on November 30, 1968, respondent and Levine were arrested and certain property was seized. The seized property included $4,940 in cash and wagering records that belonged to respondent. Shortly thereafter, the Los Angeles police officers who had prepared the affidavit in support of the search warrant notified a revenue agent of the Internal Revenue Service that respondent had been arrested for bookmaking activity. Together with a Los Angeles police officer, the revenue agent analyzed the wagering records obtained pursuant to the search warrant and determined the gross volume of respondent's gambling enterprise for the five days immediately preceding his arrest. The Los Angeles police officer further informed the revenue agent that he had conducted a surveillance of respondent's activities for the 77-day period from September 14, 1968, through November 30, 1968, the day of respondent's arrest (App. A, *infra*, pp. 3A–5A).

Respondent had not filed any federal or state tax returns pertaining to his bookmaking activities for the period from September 14, 1968, through November 30, 1968. Based upon an examination of the evidence obtained by the Los Angeles police, the Internal Revenue Service made an assessment for civil wagering taxes imposed by Section 4401 of the Internal Revenue Code of 1954 against respondent in the amount of $89,026.09 plus $123.97 of interest.

[1] "Exs." and "R." references are to the exhibits and to the three-volume record filed in the court of appeals, respectively.

The amount of the assessment was computed by determining respondent's daily gross proceeds for the five-day period covered by the wagering records analyzed by the revenue agent and multiplying the resulting figure by 77, the period of the police surveillance of respondent's activities. Pursuant to this assessment, the Internal Revenue Service levied upon the $4,940 in cash that had been seized by the Los Angeles police, in partial satisfaction of respondent's tax liability (App. A, *infra*, pp. 5A–6A).

Respondent and Levine were prosecuted for violation of local gambling laws. On February 18, 1969, they moved to quash the search warrant before the same Municipal Court judge who had issued the warrant. They urged that the affidavit in support of the warrant did not set forth in sufficient detail the reliability of the information supplied by the confidential informant, so that the issuing magistrate was unable to judge independently the reliability of the information. The motion was granted, and the court ordered that all items taken pursuant to the search warrant be returned to respondent and Levine, except the cash taken by the Internal Revenue Service (App. A, *infra*, pp. 3A–4A).

On December 9, 1970, respondent commenced this refund suit in the United States District Court for the Central District of California, seeking a refund of the $4,940 levied upon by the Internal Revenue Service in partial satisfaction of the $89,026.09 assessment (I–R. 28–31). In response, the government filed a counterclaim against respondent in the amount of $84,210.06, seeking to reduce to judgment the unpaid portion of the assessment (I–R. 48–51).

At the outset of a hearing, the district court noted that it was "reluctantly holding that the affidavit supporting the search warrant [was] insufficient under the *Spinelli* [*Spinelli* v. *United States*, 393 U.S. 410] and *Aguilar* [*Aguilar* v. *Texas*, 378 U.S. 108] doctrines" (III–R. 3). The district court thereupon found that all of the evidence underlying the tax assessment was "obtained directly or indirectly as a result of the search pursuant to the defective search warrant * * *," so that such evidence was obtained "in violation of [respondent's] Fourth Amendment rights to be free from unreasonable searches and seizures" (App. A, *infra*, p. 7A).

The district court thereupon upheld respondent's refund claim and dismissed the government's counterclaim with prejudice, stating that "substantially all, if not all" of the evidence utilized by the Internal Revenue Service in making its assessment was illegally obtained, "and, as such, the assessment was invalid." In the district court's view, once it concluded that the assessment was based upon illegally obtained evidence, respondent "[was] not required to prove the extent of the refund to which he claims he is entitled" (App. A, *infra*, p. 7A). The court of appeals affirmed on the basis of the district court's findings of fact and conclusions of law (App. B, *infra*, p. 12A).

REASONS FOR GRANTING THE WRIT

In holding that a federal civil tax assessment is invalid because it was based upon evidence obtained by local law enforcement officers pursuant to a defective search warrant, the decision below, upholding respondent's claimed refund on that ground, creates a conflict among the circuits that should be resolved by

this Court. Moreover, the invalidation of a civil tax assessment in these circumstances represents a drastic and unwarranted extension to civil proceedings of the Fourth Amendment exclusionary rule, which this Court has thus far applied to bar the use of illegally obtained evidence in criminal proceedings. Thus, this case raises a question of the utmost importance concerning the scope of the exclusionary rule as a deterrent to effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures and as an impediment to the enforcement of civil claims.

1. The decision below directly conflicts with *Compton* v. *United States*, 334 F. 2d 212 (C.A. 4). There, on essentially parallel facts, the Fourth Circuit held that a civil wagering tax assessment is not invalid despite the fact that it was based almost entirely upon evidence obtained in an illegal search conducted by local police officers, the fruits of which were made available to agents of the Internal Revenue Service. As in this case, the illegality of the search in *Compton* arose on account of a defect in the warrant. But, contrary to the decision of the courts below, the Fourth Circuit rejected the taxpayer's refund claim, observing that the fact that the assessment was premised upon the fruits of an illegal search was "not decisive of the issues here" (334 F. 2d at 215–216).

In upholding respondent's refund claim on the ground that the Service's assessment was based upon illegally seized evidence, the district court concluded that respondent "[was] not required to prove the extent of the refund to which he claims he is entitled" (App. A, *infra*, p. 7A). In so holding, the court refused to follow the longstanding rule established by

decisions of this Court, to which the Fourth Circuit adhered in *Compton*, that in a refund suit the taxpayer bears the burden of proving the exact amount that he is entitled to recover. See, *e.g.*, *Botany Mills* v. *United States*, 278 U.S. 282, 289–290; *Reinecke* v. *Spalding*, 280 U.S. 227, 232–233; *Lewis* v. *Reynolds*, 284 U.S. 281; see also *Stone* v. *White*, 301 U.S. 532. As those decisions make clear, the reason for this rule is that a suit for refund of taxes paid is analogous to an equitable action for money had and received. The taxpayer's entire liability is at issue, and he cannot prevail if the government is entitled to retain the amount claimed under any theory.

Thus, it is not enough for the taxpayer to show, as we concede respondent has done here, that the assessment was based upon the fruits of an illegal search. In order to recover, he must introduce evidence showing his correct liability and that he has in fact overpaid his taxes by the amount claimed. Indeed, in rejecting the claimed refund in *Compton*, where the taxpayer, like respondent, did nothing more than establish that the assessment was based upon illegally seized evidence, the Fourth Circuit stated, in terms particularly appropriate to the decision below: "The difficulty with plaintiff's position is that she apparently misconceives the burden of proof imposed upon her and which she must sustain in order to establish her claim of entitlement to a refund" (334 F. 2d at 216).[2]

[2] The same considerations apply to the government's counterclaim, which was erroneously dismissed by the courts below. When the government counterclaims in a tax refund suit, it presents the certificate of assessment, which is presumed to be correct and is sufficient to meet the government's initial burden of coming forward. Thereupon, the taxpayer has the burden

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2. The radical departure from the requirements of proof in tax refund suits by the decision below appears to have been predicated upon an extension of the Fourth Amendment exclusionary rule first enunciated by this Court in *Weeks* v. *United States,* 232 U.S. 383. Under that rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure. See also *Mapp* v. *Ohio,* 367 U.S. 643. In holding that the assessment "must be suppressed and quashed as being violative of the plaintiff's Fourth Amendment rights to be free from unreasonable search and seizure" (App. A, *infra,* p. 8A), the district court apparently concluded that collection of the tax due under the assessment would abridge respondent's constitutional rights.

As the Court explained in *Elkins* v. *United States,* 364 U.S. 206, 217, the purpose of the exclusionary rule is to deter unlawful police conduct. But whatever the extent to which the exclusionary rule may arguably accomplish its deterrent objective in criminal cases,[3] the Court has never extended the exclusionary rule

of proving that the assessment is incorrect and that he owes no additional tax. See, *e.g., Lucas* v. *Structural Steel Co.,* 281 U.S. 264, 271; *Wickwire* v. *Reinecke,* 275 U.S. 101, 105; *Welch* v. *Helvering,* 290 U.S. 111, 115; *United States* v. *Rexach,* 482 F. 2d 10, 15–17 (C.A. 1), certiorari denied, 414 U.S. 1039, and cases cited therein.

[3] The practical effect of the rule upon unlawful police behavior has been broadly disputed. See *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388, 424–427 (appendix to dissenting opinion of Chief Justice Burger).

to civil cases. Thus, for example, in *Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693, where the rule was invoked to exclude illegally obtained evidence in a forfeiture proceeding, the Court was careful to note that "a forfeiture proceeding is quasi-criminal in character" because "[i]ts object, like a criminal proceeding, is to penalize for the commission of an offense against the law" (380 U.S. at 700). See also *Cleary* v. *Bolger,* 371 U.S. 392, 403 (concurring opinion of Mr. Justice Goldberg).

In extending the application of the exclusionary principle to a civil case, the decision below runs counter to the analytical framework adopted by this Court only last Term in *United States* v. *Calandra,* 414 U.S. 338.[4] There, this Court declined to apply the exclusionary rule to grand jury proceedings, concluding that the potential injury to the function of the grand jury far outweighed any benefit to be derived from an application of the rule in that context. In so holding, the Court noted that the broad dictum of *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 392—that the "essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all"—had

[4] Strictly speaking, this case does not involve an application of the conventional exclusionary rule, which comes into play only at the time illegally seized evidence is sought to be introduced at trial. The district court here utilized, and the court of appeals approved, a much more radical sanction—summary judgment against the government because its cause of action was deemed tainted.

been "substantially undermined by later cases" (414 U.S. at 352–353, n. 8).[5]

Employing the *Calandra* analysis and balancing the potential harm resulting from exclusion against the benefit to Fourth Amendment values of applying the exclusionary principle, it becomes plain that it was improper to resolve this litigation in respondent's favor. The effect of the application of the rule in this case would be to foreclose for all practical purposes respondent's payment of a tax for which he would otherwise be liable. Given the widespread uncertainty over the utility of the exclusionary rule, the sanction of defeating the collection of the revenues should be imposed, if ever, only when it is beyond question that such an extension of the rule would further its broad rationale of deterrence. As a general proposition, the extension of the exclusionary rule to invalidate a tax assessment that is purely civil in character would seem to be unrelated to the goal of preventing future unlawful police conduct. As the Court stated in *Calandra*: "[T]he need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a *criminal sanction* on the victim of the search" (414 U.S. at 348; emphasis supplied).

Indeed, the inapplicability of the deterrence theory is especially evident here, since it is wholly unrealistic

[5] In applying the exclusionary rule in civil cases, the lower courts have heavily relied upon the *Silverthorne* dictum. See, *e.g.*, *Pizzarello* v. *United States*, 408 F. 2d 579, 585 (C.A. 2); *Suarez* v. *Commissioner*, 58 T.C. 792, 802.

to assume that local police officers would be deterred from illegal searches and seizures because a possible federal civil tax liability might be rendered uncollectable. The connection between the illegal search conducted by the Los Angeles police and the civil federal tax assessment made against respondent is so indirect and attenuated that reliance upon the deterrence rationale would at best involve hazardous speculation. Compare *Elkins* v. *United States,* 364 U.S. 206, 211–214, and cases cited therein.

Finally, extension of the exclusionary principle is particulary unwarranted in the context of this case, where the illegality of the search derived from a defect in a search warrant issued by a judge. As the Court recently stated in *Michigan* v. *Tucker,* 417 U.S. 433, 447: "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right." However, where the official action is taken in complete good faith, the Court indicated that "the deterrence rationale loses much of its force" (*ibid.*).[6] Under these circumstances, the use of the exclusionary principle to punish the federal tax collector for local police conduct calls for review by this Court.

[6] There can be little doubt that the actions of the Los Angeles police in this case were done in good faith. Indeed, the difficulty of applying the rule of *Spinelli* v. *United States*, 393 U.S. 410, the basis on which the search warrant against respondent was held to be defective, is amply illustrated by the proliferation of views in *United States* v. *Harris*, 403 U.S. 573, which was accompanied by five separate opinions.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
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FEBRUARY 1975.

APPENDIX A

[Filed: February 27, 1973; Clerk, U.S. District Court, Central District of California by Deputy]

United States District Court, Central District of California

No. 70-1383-MML

MAX JANIS, PLAINTIFF
v.
UNITED STATES OF AMERICA, AND FRANK S. SCHMIDT, DISTRICT DIRECTOR OF INTERNAL REVENUE, DEFENDANTS

Findings of Fact and Conclusions of Law

Sherman and Sturman, 8500 Wilshire Boulevard, Suite 908, Beverly Hills, Calif. 90211, (213) 655-8862. Attorneys for Plaintiff Max Janis.

The above-entitled cause came on regularly for hearing on the plaintiff's motions and trial on February 13, 1973, before the Honorable Malcolm M. Lucas, United States District Judge; Sherman and Sturman, by Richard G. Sherman, Esq. and Herbert D. Sturman, Esq., appearing as counsel for plaintiff, and William D. Keller, United States Attorney for the Central District of California, Charles H. Magnuson, Assistant United States Attorney, Chief, Tax Division, and Mason C. Lewis, Assistant United States Attorney, appearing as counsel for the defendants; the Court having considered all of the pleadings and files in this matter, the plaintiff's motions with annexed exhibits and the defendant's responses thereto, the stipulated facts in the Pre Trial Conference

Order, the arguments of counsel, and being fully advised in the premises, makes the following findings of fact:

1. This is an action for the refund of internal revenue taxes. The plaintiff herein is one Max Janis; the defendants herein are Frank S. Schmidt, District Director of Internal Revenue, and the United States of America, a sovereign body politic. The plaintiff seeks the recovery of $4,940.00, together with interest thereon as provided by law. The defendants have counterclaimed for the recovery of taxes allegedly due and owing from the plaintiff to the defendants in the net sum of $84,210.06, together with interest thereon as provided by law. The pleadings which raise the issues are as follows:

A. Amended Complaint for Refund of Taxes.

B. Amended Answer and Counterclaim.

2. Federal jurisdiction and venue are invoked upon the following grounds:

A. Plaintiff is a citizen of the United States and resides in the County of Los Angeles in the Central District of California.

B. Defendant, Frank S. Schmidt, is, and at all times relevant hereto was, the District Director of Internal Revenue for the Los Angeles District of California.

C. The defendant, United States of America, is a sovereign body politic.

D. The Court has jurisdiction and venue of this action for refund of internal revenue taxes pursuant to 26 U.S.C. Section 7422, 28 U.S.C. Sections 1346(a)(1), 1391(b) and 1402(a)(1), and the internal revenue laws of the United States.

E. The Court has jurisdiction of the counterclaim hereof pursuant to 28 U.S.C. Sections 1340 and 1346(c).

3. On December 5, 1968, defendants by and through their agents, assessed an excise tax deficiency against plaintiff in the sum of $89,026.09, plus interest in the sum of $123.97.

4. The items upon which the defendants based their assessment against plaintiff were originally obtained by officers of the Los Angeles Police Department pursuant to Search Warrant 1878, issued on November 26, 1968, by the Honorable Xenophon F. Lang, Judge of the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California. Said search warrant was issued by Judge Lang on the basis of an affidavit in support of said search warrant, executed by one Leonard Weissman, a Los Angeles Police Officer attached to the Administrative Vice Division.

5. The aforementioned search warrant, in turn, was acted upon by the Los Angeles Police Department on November 30, 1968, at which time the plaintiff and one Morris Aaron Levine were arrested and the premises in which the plaintiff and Mr. Levine were found were searched.

6. At the time of the arrests and search, to wit, on November 30, 1968, certain property of the plaintiff and the said Morris Aaron Levine was seized by the Los Angeles police officers. Included within the seized property was cash in the sum of $4,940.00, which such cash constituted the property of the plaintiff. In addition thereto, certain betting markers and other documents were seized.

7. Following the arrests of the plaintiff and Mr. Levine as aforesaid, a prosecution was instituted in the Municipal Court of the Los Angeles Judicial

District of the State of California, bearing Case No. A 239 336, and entitled *People of the State of California, Plaintiff* v. *Max Janis and Morris Aaron Levine, Defendants.* On February 18, 1969, the plaintiff herein and Morris Aaron Levine moved to quash the aforementioned search warrant before the Honorable Xenophon F. Lang, Municipal Court Judge who was the same magistrate who had originally issued said warrant. The motion to quash the search warrant was granted by Judge Lang on the grounds that the affidavit in support thereof failed to set forth the underlying circumstances necessary to enable the issuing magistrate to independently judge the validity and reliability of the informant's information. Judge Lang further ordered that all items seized pursuant to the said search warrant be returned to the plaintiff herein and Morris Aaron Levine, save and except Judge Lang did not order the return of the cash in the sum of $4,940.00, which had been seized by the defendants on December 5, 1968.

8. The defendants predicated their assessment of an excise tax deficiency against plaintiff herein in the sum of $89,026.09, plus interest of $123.97, solely upon items which had been seized by the Los Angeles Police Department pursuant to the aforementioned search warrant and upon conversations had with representatives of the Los Angeles Police Department relating to the contents of the items seized pursuant to the search warrant and the duration of plaintiff's alleged wagering activities.

9. On December 3, 1968, Leonard Weissman, a Los Angeles Police Officer, informed Morris Nimovitz, a revenue officer of the Internal Revenue Service, that the plaintiff herein had been arrested for alleged bookmaking activities. Officer Weissman was the same person who had prepared the affidavit in support of

the search warrant which had been quashed by Judge Lang on the basis of an insufficient affidavit in support thereof. Mr. Nimovitz proceeded to the Los Angeles Police Department and with the help of Officer Weissman, analyzed certain betting markers and information which had been seized pursuant to the aforementioned search warrant. On the basis of their analysis, the gross volume of bookmaking activities alleged to have been conducted by the plaintiff herein and Morris Aaron Levine was determined for the five days immediately preceding the arrest of the plaintiff herein and Morris Aaron Levine. Officer Weissman further informed Mr. Nimovitz that he had commenced his investigation of the plaintiff herein on September 14, 1968, which continued on an intermittent basis through November 30, 1968, the date of the arrest. On the basis of the information given by Officer Weissman to Mr. Nimovitz, the civil tax assessment was made by taking five days of activities as determined from the items seized pursuant to the aforementioned search warrant and multiplying the daily gross volume times 77 days, to wit, the period of Officer Weissman's intermittent surveillance (September 14, 1968 through November 30, 1968).

10. The sole basis of the computation of the civil tax assessment against the plaintiff herein was, therefore, the items obtained pursuant to the search warrant (five days of receipts and currency in the amount of $4,940.00) and the information furnished to Mr. Nimovitz by Officer Weissman with respect to the duration of plaintiff's alleged wagering activities.

11. The plaintiff has not filed any tax returns with either the Internal Revenue Service or the Franchise Tax Board of the State of California pertaining to his alleged bookmaking activities for the period of September 14, 1968 through November 30, 1968.

12. The plaintiff herein seeks a refund in the sum of $4,940.00, together with interest thereon as provided by law. Said $4,940.00 constituted the property of the plaintiff which was levied upon and seized by the defendants herein on December 5, 1968. The defendants, in turn, have filed a counterclaim against the plaintiff seeking to reduce to judgment the unpaid portion of its assessment against plaintiff, together with interest thereon. The amount of said unpaid portion is $84,210.06, which such amount is arrived at by deducting the sum of $4,940.00, i.e., the amount seized and levied upon by the Internal Revenue Service on December 5, 1968, from the assessment of $89,150.06.

13. The plaintiff's duly filed motions for suppression of evidence, to quash the assessment, and to shift the burden of proof to the defendant United States. For the reasons which follow hereafter said motions must be granted.

14. Independent examination of the affidavit which was the basis of the search warrant that Judge Lang had quashed reveals that said affidavit does not detail any of the "underlying circumstances" upon which the informants' conclusions were based. The affidavit in question is strikingly similar to the affidavit held to be defective in *Spinelli* v. *United States,* 393 U.S. 410 (1969). Said affidavit does not detail any of the "underlying circumstances" upon which the informants' conclusions were based; nor are there any allegations that the informants personally observed any conduct on the part of Janis or Levine, illegal or otherwise; as such, there was no probable cause for the issuance of said search warrant for the reasons expressed by the Supreme Court in *Spinelli* at 393 U.S. 418.

15. All of the evidence utilized as the basis of

defendants' assessment against plaintiff was obtained directly or indirectly as a result of the search pursuant to the defective search warrant as aforesaid. Consequently, the defendants' assessment against plaintiff was based in substantial part, if not completely, on illegally procured evidence, which such evidence was seized and obtained in violation of plaintiff's Fourth Amendment rights to be free from unreasonable searches and seizures.

And from the foregoing findings of fact, the Court concludes as follows:

1. This Court has jurisdiction over the subject matter and the parties hereto.

2. Plaintiff is entitled to a refund of $4,940.00, together with interest thereon, as prayed for in the Complaint for the reason that substantially all, if not all, of the evidence utilized by the defendants herein in making their assessment in the sum of $89,026.09 against plaintiff was illegally obtained, and, as such, the assessment was invalid.

3. Where, as in this case, illegally obtained evidence constitutes the basis of a federal tax assessment, plaintiff is not required to prove the extent of the refund to which he claims he is entitled. It is sufficient that plaintiff prove that substantially all, if not all, of the evidence upon which the assessment was based was the result of illegally obtained evidence.

4. The defendants' counterclaim should be dismissed with prejudice as said counterclaim seeks to reduce to judgment a federal tax assessment which was based substantially all, if not all, upon illegally obtained evidence.

5. Plaintiff is entitled to judgment on his complaint in the sum of $4,940.00, together with interest thereon as provided by law, and defendants shall take nothing on their counterclaim.

6. The civil excise tax assessment in the sum of $89,026.09 against Max Janis was based substantially *upon evidence illegally* obtained from the above described search and seizure; and, as a consequence thereof, such assessment, although civil in nature, is invalid and must be suppressed and quashed as being violative of the plaintiff's Fourth Amendment rights to be free from unreasonable search and seizure.

7. The information upon which the assessment was made did not come from any source independent of the illegal search and seizure and the rule of *United States* v. *Bacall,* 443 F. 2d 1050 (9th Cir. 1971), is not applicable to the facts of this case.

8. Where findings of fact and conclusions of law hereunder constitute mixed questions of law and fact, they shall be deemed to constitute a finding of fact and/or a conclusion of law, as the case may be.

(S) Malcolm M. Lucas,
MALCOLM M. LUCAS,
U.S. District Judge.

Dated: FEBRUARY 27, 1973.

[Filed: February 27, 1973; Clerk, U.S. District Court, Central District of California by Deputy]

[Entered: February 27, 1973; Clerk, U.S. District Court, Central District of California by Deputy]

United States District Court Central District of California

No. 70–1383–MML

MAX JANIS, PLAINTIFF

v.

UNITED STATES OF AMERICA, AND FRANK S. SCHMIDT, DISTRICT DIRECTOR OF INTERNAL REVENUE, DEFENDANTS

ORDER

Sherman and Sturman, 8500 Wilshire Boulevard, Suite 908, Beverly Hills, Calif. 90211, (213) 655–8862. Attorneys for Plaintiff, Max Janis.

The above-entitled cause came on regularly for hearing on the plaintiff's motions and trail on February 13, 1973, before the Honorable Malcolm M. Lucas, United States District Judge; Sherman and Sturman, Esq., appearing as counsel for plaintiff, and William D. Keller, United States Attorney for the Central District of California, Charles H. Magnuson, Assistant United States Attorney, appearing as counsel for the defendants; the Court having considered all of the pleadings and files in this matter, the plaintiff's motions with annexed exhibits and the defendant's responses thereto, the stipulated facts in the Pre Trial Conference Order; the arguments of counsel, and hav-

ing entered its Findings of Fact and Conclusions of Law, orders that:

1. The items listed below be suppressed as evidence in this and any future criminal and civil proceedings and returned to the plaintiff herein:

a) All items of personal property or copies thereof, including but not limited to written, printed, typed documents, notations, books, notebooks, magazines, records, cards, and miscellaneous papers, together with all other items of physical evidence seized from plaintiff on November 30, 1968, and from plaintiff's apartment at 1155 North LaCienega, Apartment 904, Los Angeles, California, by officers of the Los Angeles Police Department pursuant to search warrant 1878, issued on November 26, 1968, by the Honorable Xenophon Lang, Judge of the Municipal Court, Los Angeles Judicial District, State of California.

b) All statements, admissions, and confessions of the plaintiff made by him on November 30, 1968.

c) Any and all fruits of the above described arrest and search and all evidence obtained as a direct or indirect result of said arrest and search.

d) All monies and properties seized from the plaintiff as a result of the civil tax assessment based upon said arrest and search.

2. The civil tax assessment made by the Internal Revenue Service on December 5, 1968, in the amount of $89,026.09 against all the property and assets of the plaintiff Max Janis be quashed on the ground that said assessment is the product of illegally obtained evidence.

3. Plaintiff shall have judgment on his complaint in the sum of $4,940.00, together with interest thereon as provided by law, and defendants' shall take nothing on their counterclaim.

4. The defendants' counterclaim should be dismissed with prejudice as said counterclaim seeks to reduce to judgment a federal tax assessment which was based substantially all, if not all, upon illegally obtained evidence.

FEBRUARY 27, 1973.

(S) Malcolm M. Lucas,
MALCOLM M. LUCAS,
United States District Judge.

APPENDIX B

United States Court of Appeals
for the Ninth Circuit

(No. 73–2226)

MAX JANIS, APPELLEE

v.

UNITED STATES OF AMERICA, AND FRANK SCHMIDT, ETC., APPELLANTS

Memorandum of Affirmance

[July 22, 1974]

Appeal from the United States District Court
for the Central District of California

Before ELY and HUFSTEDLER, Circuit Judges, and TURRENTINE, District Judge*

Upon the basis of the District Court's very carefully written Findings of Fact and Conclusions of Law, the judgment of the District Court is

Affirmed.

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* Honorable Howard B. Turrentine, United States District Judge, San Diego, California, sitting by designation.

APPENDIX C

United States Court of Appeals for the Ninth Circuit

(No. 73–2226, DC 70–1383)

MAX JANIS, APPELLEE

v.

UNITED STATES OF AMERICA, AND FRANK SCHMIDT, ETC., APPELLANTS

Judgment

Appeal from the United States District Court for the Central District of California.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

A true copy.

Attest: January 10, 1975.

EMIL E. MELFI, JR.,
Clerk.

By RAY HEWITT,
Senior Deputy.

Filed and entered July 22, 1974.

APPENDIX D

[Filed: September 5, 1974, Emil E. Melfi, Jr., Clerk, U.S. Court of Appeals]

United States Court of Appeals for the Ninth Circuit

No. 73-2226

MAX JANIS, APPELLEE

v.

UNITED STATES OF AMERICA, AND FRANK SCHMIDT, ETC., APPELLANTS

Order

ON PETITION FOR REHEARING

Before ELY and HUFSTEDLER, Circuit Judges, and TURRENTINE, District Judge.*

The Petition for Rehearing is Denied.

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* Honorable Howard B. Turrentine, United States District Judge, San Diego, California, sitting by designation.

U.S. GOVERNMENT PRINTING OFFICE: 1975